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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEFFREY OLSEN,

Defendant.

No. CR 17-76-CJC

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S RENEWED MOTION TO
DISMISS ON SPEEDY TRIAL GROUNDS

Hearing Date: 9:00 a.m.
Hearing Time: August 22, 2022
Location: Courtroom of the
Hon. Cormac J.
Carney

Plaintiff United States of America, by and through its counsel
of record, the Acting United States Attorney for the Central District
of California and Assistant United States Attorney Samuel J. Diaz,
hereby files its Opposition to defendant's renewed motion to dismiss
on Speedy Trial grounds.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On appeal, the Ninth Circuit held that this Court erred in
4 denying the government's request for an ends-of-justice continuance
5 of the trial date from October 13, 2020 to December 1, 2020, and that
6 the Court abused its discretion in dismissing the Indictment with
7 prejudice. It therefore reversed this Court's judgment and remanded
8 the case "with instructions to reinstate Olsen's indictment, grant an
9 ends of justice continuance, and set this case for a trial." United
10 States v. Olsen, 21 F.4th 1036, 1049 (9th Cir. 2022). The Court
11 should do just that.

12 In his renewed motion to dismiss, defendant urges the Court to
13 once again evaluate whether to grant the government's ex parte
14 application for a continuance. This would constitute error. The
15 remand limits the Court to strictly effectuating the Ninth Circuit's
16 mandate. That mandate orders the Court to grant an appropriate
17 continuance and set this case for trial, not to evaluate defendant's
18 motion anew nor to conduct an evidentiary hearing as to the
19 circumstances that existed in October 2020. Similarly, the law of
20 the case doctrine precludes the Court from revisiting any of the
21 Ninth Circuit's holdings.

22 But even if this Court were permitted to reevaluate the issues
23 that the Ninth Circuit foreclosed, the factors the Circuit enumerated
24 weigh heavily in favor of an ends-of-justice continuance and
25 certainly do not support dismissal of the Indictment with prejudice.
26 Nor should this Court sanction further delay to conduct an
27 evidentiary hearing on irrelevant issues--if defendant genuinely
28

1 wants a trial, he should have it. His renewed motion to dismiss
2 should be denied and a trial date set.

3 **II. STATEMENT OF FACTS**

4 **A. Defendant was Indicted for Illegally Selling Prescription**
5 **Drugs to Patients and for Lying to the DEA**

6 From 2013 to 2016, defendant, then a California-licensed
7 physician, knowingly and intentionally distributed oxycodone,
8 amphetamine salts, alprazolam, and hydrocodone to numerous patients
9 outside the regular course of professional practice and without any
10 legitimate medical purposes. (Dkt. 1.) On July 7, 2017, defendant
11 was indicted on 34 counts of distribution of controlled substances
12 and one count of making a false statement in a Drug Enforcement
13 Administration ("DEA") application. (Id.) Four days later,
14 defendant appeared for his arraignment and was released on bond the
15 same day. (Dkt. 10.) At defendant's arraignment, the Court set a
16 trial date of September 5, 2017. (Id.)

17 **B. Defendant Requested and Obtained Eight Continuances**

18 Defendant requested, and obtained, eight continuances that
19 collectively continued the trial for over three years. The first
20 continuance continued the trial from September 5, 2017 to January 30,
21 2018. (Dkt. 19.) The second continuance continued the trial from
22 January 30, 2018 to August 14, 2018. (Dkt. 21). The third
23 continuance continued the trial from August 14, 2018 to December 4,
24 2018. (Dkt. 23.) The fourth continuance continued the trial from
25 December 4, 2018 to June 18, 2019. (Dkt. 26.) The fifth continuance
26 continued the trial from June 18, 2019 to November 5, 2019. (Dkt.
27 35.) The sixth continuance, which the government opposed, continued
28 the trial from November 5, 2019 to May 5, 2020. (Dkt. 42.) The

1 seventh continuance continued the trial from May 5, 2020 to July 21,
2 2020. (Dkt. 44.) Lastly, the eighth continuance continued the trial
3 from July 21, 2020 to October 13, 2020. (Dkt. 46.)

4 **C. The Court Denied the Government's Ex Parte Request for a**
5 **Continuance and Dismissed the Indictment with Prejudice**

6 On August 28, 2020, after defendant refused to continue the
7 trial, the government filed an ex parte application to continue the
8 trial from October 13, 2020 to December 1, 2020. (Dkt. 54.) At the
9 time, all jury trials in the Central District of California ("C.D.
10 Cal.") were indefinitely suspended under C.D. Cal. General Order No.
11 20-09 ("Order 20-09"). On September 2, 2020, the Court denied the
12 government's ex parte application and requested that jurors be
13 summoned for the October 13, 2020 trial date. (Dkt. 67.) The next
14 day, the Chief Judge of the Central District of California denied the
15 Court's request pursuant to Order 20-09. (Dkt. 68.)

16 On October 14, 2020, the Court dismissed the Indictment with
17 prejudice, with its order taking effect on October 28, 2020, the day
18 after the expiration of the Speedy Trial clock. (Dkt. Nos. 98, 105.)
19 The government timely appealed.

20 **D. The Ninth Circuit Reversed the Court's Judgment and Ordered**
21 **It to Reinstate the Indictment, Grant an Appropriate Ends-**
22 **of-Justice Continuance and Set the Case for Trial**

23 The Ninth Circuit reversed the Court's judgment and remanded the
24 case "with instructions to reinstate Olsen's indictment, grant an
25 appropriate ends of justice continuance, and set this case for
26 trial." (Dkt. 114.) In doing so, it held that the Court's denial of
27 the government's ex parte application for a continuance was erroneous
28 and that the Court abused its discretion in dismissing the Indictment

1 with prejudice. United States v. Olsen, 21 F.4th 1036 (9th Cir.
2 2022). On May 16, 2022, the Ninth Circuit's mandate issued.

3 **III. ARGUMENT**

4 **A. The Law of the Case and the Rule of Mandate Doctrines** 5 **Preclude the Court from Revisiting the Ninth Circuit's** 6 **Holdings**

7 This case is before the Court on remand from the Ninth Circuit's
8 order reversing the Court's judgment and directing the Court to
9 reinstate the Indictment, grant an appropriate ends-of-justice
10 continuance, and set the case for trial. Under the law of the case
11 doctrine, the Court is barred from revisiting any issue resolved by
12 the Ninth Circuit, including its rulings that the Court erred in
13 denying the government's ends-of-justice continuance, and abused its
14 discretion in dismissing the Indictment with prejudice. Under the
15 rule of mandate doctrine, the Court must enforce, not reexamine, the
16 Ninth Circuit's mandate. Accordingly, the Court should reject
17 defendant's attempt to relitigate the government's ex parte request
18 for a continuance and set this case for trial.

19 1. The Law of the Case Doctrine Bars Relitigating the 20 Ninth Circuit's Holdings

21 Under the law of the case doctrine, "district courts are not
22 free to decide issues on remand that were previously decided either
23 expressly or by implication on appeal." Mirchandani v. United
24 States, 836 F.2d 1223, 1225 (9th Cir. 1988). This rule is limited to
25 issues "previously determined by the appellate court." The rule is
26 "necessary to the operation of a hierarchical judicial system." Id.
27 Here, the Ninth Circuit ruled that the Court erred in denying the
28 government an ends-of-justice continuance and abused its discretion

1 by dismissing the Indictment with prejudice. Under the law of the
2 case doctrine, these issues are settled.

3 a. *The Ninth Circuit Held that the Court Erred in*
4 *Denying the Government's Request for an Ends-of-*
5 *Justice Continuance*

6 On appeal, the Ninth Circuit held that this Court's denial of
7 the government's ex parte application for an ends-of-justice
8 continuance was erroneous. Olsen, 21 F.4th at 1045. First, it held
9 that the Court "committed clear error" in misinterpreting the word
10 "impossible" under 18 U.S.C. § 3161(h)(7)(B)(i) and that this error
11 alone was "enough for us to reverse." Id. "Nothing in the Speedy
12 Trial Act limits district courts to granting ends of justice
13 continuances only when holding jury trials is impossible." Id. The
14 Circuit explained that the proper inquiry under § 3161(h)(7)(B)(i)
15 was not whether "it was physically impossible to hold a trial," but
16 "'whether the failure to grant' a continuance would make continuing
17 the proceedings impossible." Id. (emphasis in original) (brackets
18 omitted).

19 Because, absent a continuance, "the Speedy Trial Act clock would
20 necessarily expire before Olsen could be brought to trial," the Ninth
21 Circuit held that the Court's "'failure to grant' an ends of justice
22 continuance in this case *did* make a continuation of Olsen's
23 proceeding impossible." Id. (emphasis in original) (brackets
24 omitted).

25 Hence, the Ninth Circuit went further than simply holding that
26 the Court misinterpreted the meaning of "impossible" under
27 § 3161(h)(7)(B)(i); it applied this provision to defendant's case and
28 expressly held that the Court's failure to grant an ends-of-justice
continuation, in light of the Central District's suspension of jury

1 trials, made continuing with defendant's proceedings impossible. Cf.
2 Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012)
3 (holding that the law of the case doctrine did not bar the district
4 court from analyzing the plaintiff's claim as "[t]he applicability of
5 Devereaux prong (2) to Hall's coercive interrogation claim had never
6 been considered or decided by any court."). Unlike in Hall, the
7 Ninth Circuit expressly ruled that the Court erred in rejecting an
8 ends-of-justice continuance under the "impossible" prong of
9 § 3161(h) (7) (B). As such, this Court is "not free" on remand to
10 revisit this issue. Mirchandani, 836 F.2d at 1225.

11 Second, the Ninth Circuit held that the Court's "failure to
12 grant the government's motion and subsequent dismissal of Olsen's
13 indictment, under the unique facts of Olsen's case and the Central
14 District's suspension of jury trials, resulted in a miscarriage of
15 justice." Olsen, 21 F.4th at 1046. It did not merely "suggest[] how
16 this Court might consider" this factor as defendant contends. (Mot.
17 at 25). Rather, it plainly held that the Court's failure to grant a
18 continuance resulted in a miscarriage of justice. It explained that
19 the "miscarriage of justice" prong under § 3161(h) (7) (B) (i) was
20 "particularly salient in Olsen's case" based on defendant facing 34
21 counts of prescribing "dangerous combinations" of pain medications to
22 patients, the fact that defendant was released on bond, and that he
23 himself delayed the trial for over three years. Id. The Ninth
24 Circuit also noted that defendant only insisted on his Speedy Trial
25 rights *after* the Central District suspended jury trials, and that the
26 government was "wholly blameless" for the Central District's jury
27 trial suspension. Id. As the Ninth Circuit expressly held that the
28

1 Court's failure to grant a continuance resulted in a miscarriage of
2 justice, the Court may not revisit this holding on remand.

3 Third, the Ninth Circuit held that the Court failed to consider
4 relevant non-statutory factors in denying the government's request
5 for a continuance under § 3161(h)(7)(B) and set out several factors
6 for district courts to consider in the context of the COVID-19
7 pandemic (the "Olsen factors"), including: "(1) whether a defendant
8 is detained pending trial; (2) how long a defendant has been
9 detained; (3) whether a defendant has invoked speedy trial rights
10 since the case's inception; (4) whether a defendant, if detained,
11 belongs to a population that is particularly susceptible to
12 complications if infected with the virus; (5) the seriousness of the
13 charges a defendant faces, and in particular whether the defendant is
14 accused of violent crimes; (6) whether there is a reason to suspect
15 recidivism if the charges against the defendant are dismissed; and
16 (7) whether the district court has the ability to safely conduct a
17 trial." Id.

18 Although the Court did not explicitly address these factors in
19 in its opinion, it decided these factors by implication by holding
20 that the Court erred in denying an ends-of-justice continuance and
21 ordering the Court to grant an appropriate ends-of-justice
22 continuance and set the case for trial. The dissent from the denial
23 of rehearing en banc itself recognized that the Ninth Circuit applied
24 these factors by implication. See Olsen, 21 F.4th at 1077 (Collins,
25 J., dissenting from denial of reh'g en banc) ("the panel
26 conspicuously did not remand for the district court to apply these
27 factors; instead, it remanded with explicit instructions to 'grant'
28 an appropriate continuance and set a new trial date . . . The panel

1 thus must be understood to have applied these factors itself.").
2 Defendant recognized that too, pointing out that the opinion
3 "preempt[ed] any further speedy-trial proceedings on remand." Def's
4 Petition for Rehearing, Olsen, Docket No. 48 at 21 (9th Cir. May 27,
5 2021). Defendant urged the Circuit to revise its opinion to permit
6 further proceedings on remand, id. at 20-22, but the Circuit did not
7 do so.

8 *b. The Ninth Circuit Held that the Court Abused Its*
9 *Discretion in Dismissing the Indictment with*
Prejudice

10 The Ninth Circuit also held that this Court abused its
11 discretion in dismissing the Indictment with prejudice. Id. at 1049.
12 Specifically, applying the 18 U.S.C. § 3162(a)(2) factors, the
13 Circuit held that, although this Court "properly weighed" the
14 seriousness of the offense against a dismissal with prejudice, the
15 Court failed to consider the facts and circumstances of defendant's
16 specific case, "including the years of continuances Olsen obtained
17 while on pre-trial release and the absence of any prosecutorial
18 culpability in causing the delay," and that the Court committed legal
19 error in construing a dismissal without prejudice as a toothless
20 remedy, in contravention of Supreme Court precedent. Id. at 1048-49
21 (citing United States v. Taylor, 487 U.S. 326 (1988) (holding that a
22 "[d]ismissal without prejudice is not a toothless sanction")). The
23 law of the case doctrine precludes the Court from revisiting the
24 Ninth Circuit's ruling that the Court abused its discretion in
25 dismissing the Indictment with prejudice.

2. The Rule of Mandate Doctrine Requires the Court to Execute the Mandate

"The rule of mandate is similar to, but broader than, the law of the case doctrine." United States v. Garcia-Beltran, 443 F.3d 1126, 1130 (9th Cir. 2006) (quoting United States v. Cote, 51 F.3d 178, 181 (9th Cir. 1995)). "[A] district court is limited by [the] remand when the scope of the remand is clear." Hall, 697 F.3d at 1067. The district court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal." United States v. Kellington, 217 F.3d 1084, 1093 (9th Cir. 2000) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895)); see also, Garcia-Beltran, 443 F.3d at 1130 ("The rule of mandate requires a lower court to act on the mandate of an appellate court, without variance or examination, only execution."). The rule of mandate is jurisdictional. Hall, 697 F.3d at 1067.

The mandate provides as follows: "[t]he judgment of the district court is REVERSED and REMANDED with instructions to reinstate Olsen's indictment, grant an appropriate ends of justice continuance, and set this case for a trial." (Dkt. 118.) By its plain terms, it directs the Court to (1) reinstate the Indictment; (2) grant an appropriate ends-of-justice continuance; and (3) set the case for trial. The mandate does not permit the Court to assess whether to reinstate the Indictment or whether to grant an appropriate continuance;¹ it orders

¹ Defendant misinterprets the plain meaning of the mandate. The mandate does not, as defendant alleges, remand for the Court to grant "whatever ends-of-justice continuance it determines to be appropriate," (Mot. at 28), it orders the Court to "grant an appropriate ends of justice continuance." Olsen, 21 F.4th at 1049.

1 the Court to do so. Accordingly, the rule of mandate prohibits the
 2 Court from venturing beyond the limited scope of the mandate on
 3 remand. See, e.g., United States v. Pimentel, 34 F.3d 799, 800 (9th
 4 Cir. 1994) (because "the scope of our remand was limited to the
 5 single sentencing issue raised in [the defendant's] prior appeal, the
 6 district court was without authority to reexamine any other
 7 sentencing issues on remand."); see also, Twentieth Century Fox Film
 8 Corp. v. Ent. Distrib., 429 F.3d 869, 883 (9th Cir. 2005) ("There is
 9 nothing in our prior decision that indicates that we issued an open
 10 remand. Rather, in remanding to the district court, our opinion
 11 contemplates a trial to resolve the only remaining genuine issue of
 12 material fact.").

13 Nor did the mandate remand the case for the Court to apply the
 14 newly announced Olsen factors in the first instance. As the dissent
 15 from the denial of rehearing en banc noted, "the panel conspicuously
 16 did not remand for the district court to apply these factors;
 17 instead, it remanded with explicit instructions to 'grant' an
 18 appropriate continuance and set a new trial date[.]" Olsen, 21 F.4th
 19 at 1077 (Collins, J., dissenting from denial of reh'g en banc).
 20 Accordingly, the Court would run afoul of the rule of mandate by
 21 applying the Olsen factors on remand.²

23 ² Defendant argues that because the government agreed to a
 24 limited remand for the Court to apply the Olsen factors in United
 25 States v. Reyes, 19-740-CJC, that there is "no legitimate basis" to
 26 argue that the Olsen factors cannot be considered here. (Mot. 42.)
 27 The distinction is obvious. The Ninth Circuit in Reyes explicitly
 28 remanded the case "for the limited purpose of permitting the court to
 reconsider Reyes's motion to dismiss under the legal standard set for
 in United States v. Olsen, 21 F.4th 1036 (9th Cir. 2022) (per
 curiam)." Id. at Dkt. 93. In contrast here, the Ninth Circuit
 remanded with instructions to "reinstate Olsen's indictment, grant an
 ends of justice continuance, and set this case for a trial." Olsen,
 21 F.4th at 1049.

1 Defendant's contention that the mandate permits the Court to
2 hold an evidentiary hearing stands on even shakier ground. Defendant
3 requests a wide ranging and open-ended evidentiary hearing into the
4 operations of the Orange County Superior Court, the Southern District
5 of California's resumption of jury trials, the Central District's
6 jury trial ban, the Executive Committee's decision-making process,
7 and the Central District's safety protocols. (Mot. at 89-95.) The
8 mandate does not authorize the Court to conduct an evidentiary
9 hearing, much less the expansive evidentiary hearing defendant seeks.
10 To the contrary, it simply directs the Court to reinstate the
11 Indictment, grant an appropriate ends-of-justice continuance, and set
12 the case for trial.

13 The mandate's clarity is not unwound by the concurrence in the
14 denial of rehearing en banc. Defendant fails to cite any support for
15 his contention that a concurrence in the denial of rehearing en banc
16 can alter or expand the mandate's clear meaning. Defendant also
17 ignores the fact that the Olsen panel had the opportunity to amend
18 the opinion to provide that, on remand, the Court was to apply the
19 Olsen factors in the first instance and/or decide whether to grant an
20 ends-of-justice continuance. It did not do so. Instead, as
21 defendant acknowledges, the amended opinion is "the same as the
22 original except for a minor change in footnote 2." (Mot. 24 n.134.)
23 Accordingly, the mandate's plain meaning controls.

24 **B. The Olsen Factors Weigh Heavily In Favor of an Ends-of-**
25 **Justice Continuance**

26 Although the law of the case doctrine precludes the Court from
27 applying the Olsen factors on remand, these factors weigh heavily in
28 favor of an ends-of-justice continuance.

1 1. Defendant Was Not Detained during Trial and Did Not
2 Spend a Single Night in Custody

3 The first, second, and fourth Olsen factors weigh in favor of an
4 ends-of-justice continuance because defendant was not detained during
5 trial and spent no time in custody. Defendant was released on bond
6 during the over three-year period that he continued the trial.
7 Olsen, 21 F.4th at 1046. In fact, on July 11, 2017, defendant was
8 arraigned and released on bond without ever serving a single night in
9 custody.

10 Defendant's argument that his Speedy Trial right is the same as
11 that of an incarcerated defendant (Mot. at 95) is wrong. "[T]he
12 Sixth Amendment's primary guarantee is against 'undue and oppressive
13 incarceration prior to trial.'" Id. at 1058 (Bumatay, J.)
14 (concurring in denial of reh'g en banc) (quoting United States v.
15 Ewell, 383 U.S. 116, 120 (1966)). While a defendant on pretrial
16 release faces limitations on his freedom, he stands outside of the
17 Sixth Amendment's core protection against prolonged pretrial
18 incarceration.

19 Moreover, since the defendant was not detained, the fourth
20 factor, which involves analyzing defendant's susceptibility to COVID-
21 19 does not weigh against a continuance.

22 2. Defendant Did Not Invoke his Speedy Trial Rights since
23 the Case's Inception

24 The third factor involves "whether a defendant has invoked
25 speedy trial rights since the case's inception[.]" Id. at 1046.
26 Defendant sought and obtained eight continuances from the case's
27 inception on July 6, 2017, which collectively continued the trial for
28 over three years. He first invoked his right to a speedy trial

1 during a hearing on August 20, 2020. Accordingly, he “did not
2 invoke[] his speedy trial rights since the case’s inception.” Id.
3 at 21 F.4th at 1052 (Christen, Murgia JJ.) (concurring in denial of
4 reh’g en banc).

5 Defendant argues that this factor really asks whether defendant
6 “invoked his speedy-trial rights in a reasonable manner.” (Mot. at
7 96). Defendant attempts to rewrite this factor because it plainly
8 weighs in favor of a continuance. Defendant did not invoke his
9 speedy trial rights since the case’s inception, rather he requested
10 to continue the trial eight times, which resulted in delay of over
11 three years. Defendant’s requests for continuances, moreover, did
12 not constitute the type of blanket waiver prohibited under Zedner v.
13 United States, 547 U.S. 489 (2006). Rather, each of defendant’s
14 eight continuances contained factual findings that justified each
15 respective ends-of-justice continuance.

16 3. The Severity of the Charges Weigh in Favor of a
17 Continuance

18 Under the fifth factor, courts are to assess “the seriousness of
19 the charges a defendant faces,” including whether they involve
20 violent crimes. Olsen, 21 F.4th at 1046. While not a violent
21 offense, the charges against defendant are extremely serious.
22 Defendant is indicted on “thirty-four counts related to his
23 prescribing dangerous combinations and unnecessary amounts of highly
24 regulated pain medications[.]” Id. The Ninth Circuit has repeatedly
25 held that drug distribution is a serious crime. See United States v.
26 Medina, 524 F.3d 974, 987 (9th Cir. 2008) (affirming district court’s
27 dismissal without prejudice based on the seriousness of the
28 conspiracy and drug-distribution charges); Taylor v. Lewis, 460 F.3d

1 1093, 1099 (9th Cir. 2006) (possession of cocaine offense serious).
2 As this Court explained, "[t]here is no doubt that the crimes of
3 which Mr. Olsen is accused . . . are extremely serious." (Dkt. 98 at
4 17.)

5 Defendant's attempt to waive this factor away by invoking the
6 presumption of innocence and arguing that the charges are mere
7 allegations at this stage is of no import to this analysis. (Mot. at
8 97-98.) All charges are necessarily allegations at the Speedy Trial
9 motion stage. Because the charges against defendant are serious,
10 this factor weighs in favor of a continuance.

11 4. The Risk that Defendant will Reoffend if Charges are
12 Dismissed Weighs in Favor of a Continuance

13 The sixth factor involves analyzing "whether there is a reason
14 to suspect recidivism if the charges against the defendant are
15 dismissed." Olsen, 21 F.4th at 1046. Defendant, who distributed
16 dangerous combinations of controlled substances to customers over
17 several years, presents a plain risk of re-engaging in similar
18 conduct if the charges are dismissed, especially if he is able to
19 regain his ability to prescribe controlled substances.

20 5. The Court's Ability to Conduct a Safe Trial Is, At
21 Best, the Sole Olsen Factor that Weighs Against a
Continuance

22 Defendant spends 47 pages of his 129-page motion arguing that
23 the Court could have conducted a safe trial in October 2020, and
24 highlights the health measures implemented by several state courts,
25 including the Orange County Superior Court, the Los Angeles County
26 Superior Court, the Riverside County Superior Court, and others,
27 along with the number of jury trials those courts conducted within a
28 year of the pandemic. (Mot. at 48-95.) Defendant also points to the

1 Southern District of California's resumption of jury trials in August
2 2020.

3 Defendant's argument that the Court could have conducted a safe
4 trial was rejected in Olsen. The Ninth Circuit held that the Central
5 District was permitted to "temporarily suspend jury trials in the
6 interest of public health" in light of the health risks posed by the
7 COVID-19 pandemic. 21 F.4th at 1047. It noted that even though
8 state courts within the Central District were conducting jury trials,
9 that it did not necessarily mean that they were conducting those
10 trials safely. Id. at n.10.

11 But even assuming, for purposes of argument, that the Court
12 could have conducted a safe enough trial in October 2020, this is at
13 most one factor in defendant's favor. As discussed above, the
14 remainder of the Olsen factors weigh heavily in favor of an ends-of-
15 justice continuance.

16 **C. Any Dismissal Should be Without Prejudice**

17 Should the Court find that dismissal is warranted, the dismissal
18 should be without prejudice. "In determining whether to dismiss the
19 case with or without prejudice, the court shall consider, among
20 others, each of the following factors: [1] the seriousness of the
21 offense; [2] the facts and circumstances of the case which led to the
22 dismissal; and [3] the impact of a reprosecution on the
23 administration of this chapter and on the administration of justice."
24 18 U.S.C. § 3162(a)(2). "The defendant has the burden of proving
25 that the delay meets the criteria for dismissal." United States v.
26 Medina, 524 F.3d 974, 980 (9th Cir. 2008). All of these factors
27 weigh against dismissal of the Indictment with prejudice.
28

1 1. The Seriousness of Defendant's Crimes Weigh Against
2 Dismissal with Prejudice

3 As recognized by this Court, the first factor, the seriousness
4 of the offense, "prescribing dangerous combinations and unnecessary
5 amounts of highly regulated pain medications" "weighs in favor of a
6 dismissal without prejudice." (Dkt. 98 at 17).

7 2. Defendant's Three-Year Delay and Absence of
8 Prosecutorial Culpability Weigh Against Dismissal with
9 Prejudice

10 The second factor, the facts and circumstances that led to the
11 dismissal, also weighs in favor of a dismissal without prejudice. As
12 the Circuit explained, the focus of this inquiry centers on the
13 specific facts of defendant's case, not "the Central District's
14 suspension of jury trials." Olsen, 21 F.4th at 1048.

15 The government did not act in bad faith or engage in "a pattern
16 of neglect", Taylor, 487 U.S. at 339, so as to make a dismissal with
17 prejudice appropriate. As both the Circuit and this Court have
18 noted, the government is not at fault for the failure to try
19 defendant within the Speedy Trial Act's time constraints. See Olsen,
20 F.4th at 1046 (finding that at the time defendant invoked his Speedy
21 Trial rights "the prosecution had been ready for trial for months and
22 was wholly blameless for the Central District's suspension of jury
23 trials."; id. at 1048 (noting "the absence of any prosecutorial
24 culpability in causing the delay"); (Dkt. 52, Tr. at 20) ("It's not
25 the government's fault. I know the government's ready."); (Dkt. 100
26 at 4) ("It was the judges' fault. It wasn't the government's
27 fault."). The Central District made the decision to suspend jury
28 trials, not the government.

1 Defendant cites the Second Circuit's opinion in United States v.
2 Bert, 814 F.3d 70 (2d Cir. 2016) to argue that a delay caused by the
3 Court can justify a dismissal with prejudice. (Mot. at 104-106.) In
4 Bert, the Court took over a year to rule on the defendant's motion to
5 suppress after it had taken the motion under advisement, all while
6 the defendant remained in custody, and as the Speedy Trial clock
7 elapsed. 814 F.3d at 74.

8 Bert is inapplicable. Unlike in Bert, this Court *did not* cause
9 the delay. To the contrary, the Court sought to summon jurors for
10 the October 13, 2020 jury trial, but its request was denied pursuant
11 to the Central District's jury trial suspension. (See Dkt. Nos. 68,
12 69.) The Circuit, moreover, has explained that the Central
13 District's suspension of jury trials was not part of the "facts and
14 circumstances of Olsen's case." Olsen, 21 F.4th at 1048.
15 Accordingly, the Central District's jury trial suspension should play
16 no role in the analysis of whether to dismiss the Indictment with or
17 without prejudice.

18 And unlike the defendant in Bert, defendant here was on pretrial
19 release and did not sit in custody as the Speedy Trial deadline
20 elapsed. Further, the Second Circuit held that the government in
21 Bert engaged in "negligent conduct," by taking "no action whatsoever
22 in this case during the year in which [the defendant's] motion was
23 under advisement." 814 F.3d at 86. As explained above, the
24 government was not negligent here. Worst still for defendant, Bert
25 did not even hold that the case should be dismissed with prejudice;
26 it simply remanded the case for the district court to complete its
27 analysis in light of its opinion. Id. at 86-87.

Defendant, on the other hand, is responsible for continuing the trial for over three years, all while he remained on pretrial release. Defendant requested eight Speedy Trial continuances, which collectively continued the trial date from September 5, 2017 to October 13, 2020. Prior to the COVID-19 pandemic, the government opposed defendant's request for a fifth continuance and sought to try him on November 5, 2019, but defendant indicated that he needed additional time. Defendant's justifications for this delay, including the volume of discovery and his counsel's need for more time to adequately prepare for trial (see Mot. at 6-10) do not change the fact that the delay here was of defendant's own doing. Because of "the years of continuances Olsen obtained while on pre-trial release and the absence of any prosecutorial culpability in causing the delay," Olsen, 21 F.4th at 1048, the facts and circumstances that led to the dismissal in this case weigh against dismissal with prejudice.

3. Impact of Reprosecution on the Administration of Justice Weighs in Favor of a Dismissal Without Prejudice

Because the impact of reprosecution under the facts of this case would not imperil the administration of justice, any dismissal should be without prejudice. While defendant urges the Court to again dismiss the Indictment with prejudice to teach the Central District and the government "a necessary lesson," (Mot. at 108), the Circuit has already rejected this argument as irrelevant to the inquiry at hand. Olsen, 21 F.4th at 1048. It held that the "perceived need to deter the Central District from continuing its jury trial suspension" was not a case-specific factor. Id. ("[i]t appears that the only

1 case-specific factor the court considered was the seriousness of
2 Olsen's crimes").

3 Under the specific facts and circumstances of this case,
4 including the lack of prosecutorial misconduct or neglect, the lack
5 of prejudice to the defendant who remained on bond during the
6 entirety of this delay and who himself requested a delay of over
7 three years, and the fact that the Court dismissed the Indictment on
8 the very day after the Speedy Trial clock expired, the proper remedy,
9 should the Court dismiss the Indictment, is dismissal without
10 prejudice. As the Circuit emphasized, "[d]ismissal without prejudice
11 is not a toothless sanction: it forces the Government to obtain a new
12 indictment if it decides to re prosecute, and it exposes the
13 prosecution to dismissal on statute of limitations grounds." Id.
14 1048-49 (citing Taylor, 487 U.S. at 342).

15 The Court should not dismiss the Indictment because defendant's
16 Speedy Trial Act rights were not violated. However, should the Court
17 dismiss the Indictment, it should do so without prejudice.

18 **D. Defendant's Sixth Amendment Right to a Speedy Trial was Not**
19 **Violated**

20 Defendant also alleges that his Sixth Amendment right to a
21 Speedy Trial has been violated. (Mot. at 109.) His argument is
22 unavailing because the length of the delay in this case is not
23 excessive and the delay is attributable to defendant's own conduct,
24 specifically, his successive requests for continuances and his
25 decision to substitute counsel. Moreover, defendant cannot establish
26 actual prejudice.

1 1. Legal Standard

2 The Sixth Amendment guarantees that “[i]n all criminal
3 prosecutions, the accused shall enjoy the right to a speedy and
4 public trial.” Under Barker v. Wingo, 407 U.S. 514, 530 (1972),
5 courts review four factors in determining whether a defendant has
6 been deprived of his right to a speedy trial: (1) the length of the
7 delay; (2) the reason for the delay; (3) the defendant's assertion of
8 his right to a speedy trial; and (4) the prejudice to the defendant.
9 “[N]one of the four factors identified [is] either a necessary or
10 sufficient condition to the finding of a deprivation of the right of
11 speedy trial. Rather, they are related factors and must be
12 considered together with such other circumstances as may be
13 relevant.” Barker, 407 U.S. at 533.

14 2. Length of Delay

15 The first Barker factor, the length of the delay, does not weigh
16 in defendant's favor. The length of the delay “is a threshold
17 issue.” United States v. Gregory, 322 F.3d 1157, 1161 (9th Cir.
18 2003). Under the Sixth Amendment, delay is measured from “the time
19 of the indictment to the time of trial.” United States v. Sears,
20 Roebuck & Co., 877 F.2d 734, 739 (9th Cir. 1989). “Although there is
21 no bright-line rule, courts generally have found that delays
22 approaching one year are presumptively prejudicial” that require
23 inquiry into the other Barker factors. Gregory, 322 F.3d at 1161-62.
24 The length is considered in light of “the seriousness of the charges,
25 the volume of discovery, and the [complexity of the] evidence
26 involved.” Doyle v. Law, 464 F. App'x 601, 603 (9th Cir. 2011).
27 Here, the length of the delay calculated from the time of the
28 Indictment to October 27, 2020, is approximately 40 months. This

1 amount of delay is not excessive, especially in light of the
2 seriousness of the charges, the volume of discovery, and the
3 complexity of the evidence involved. See United States v. King, 483
4 F.3d 969, 976 (9th Cir. 2007) (holding that "nearly two years" was
5 "not excessive" and "d[id] not seriously weigh in [the defendant]'s
6 favor"); see also Barker, 407 U.S. at 534 (no Speedy Trial violation
7 despite defendant spending four years under indictment, including ten
8 months in custody). As explained above, defendant is facing 34
9 counts of prescribing and distributing controlled substances, namely,
10 oxycodone, amphetamine salts, alprazolam, and hydrocodone. These
11 counts carry maximum penalties ranging from 5 to 20 years'
12 imprisonment. The Court has concluded that it is a "serious" case.
13 (Dkt. 51, Tr. at 8.) As conceded by defense counsel in a prior court
14 filing, the case involves an extraordinary volume of discovery and
15 complicated evidence that require the retaining of an expert. It
16 involves 35 counts relating to conduct that spans over 3 years and
17 the discovery contains approximately 77,000 files, which is about 41
18 GB. (Dkt 36.) Because these files include recordings of undercover
19 patient visits and thousands of prescriptions, the parties had to
20 retain experts to review and analyze the evidence. (See id.)

21 More importantly, as Olsen plainly held, the Speedy Trial Act
22 was not violated. The Ninth Circuit has held that "it will be an
23 unusual case in which the time limits of the Speedy Trial Act have
24 been met but the sixth amendment right to speedy trial has been
25 violated." United States v. Nance, 666 F.2d 353, 360 (9th Cir.
26 1982); see also, United States v. Baker, 63 F.3d 1478, 1497 (9th Cir.
27 1995) ("Speedy Trial Act affords greater protection to a defendant's
28 right to a speedy trial than is guaranteed by the Sixth Amendment,

1 and therefore a trial which complies with the Act raises a strong
2 presumption of compliance with the Constitution."). A strong
3 presumption of compliance with the Sixth Amendment therefore applies
4 to the case at hand. As such, the length of the delay does not weigh
5 in defendant's favor.

6 3. Reason for the Delay

7 The second Barker factor, the reason for the delay, weighs
8 substantially against a finding that the Sixth Amendment Speedy Trial
9 violation.

10 "[T]he reason for the delay . . . is the focal point of the
11 [Barker] inquiry." King, 483 F.3d at 976. "A deliberate attempt to
12 delay the trial in order to hamper the defense should be weighted
13 heavily against the government." Barker, 407 U.S. at 531. Whereas
14 "[a] more neutral reason such as negligence or overcrowded courts
15 should be weighted less heavily." Id. "[A] valid reason, such as a
16 missing witness, should serve to justify appropriate delay." Id.

17 "On the other hand, delay attributable to the defendant's own
18 acts or to tactical decisions by defense counsel will not bolster
19 defendant's speedy trial argument." McNeely v. Blanas, 336 F.3d 822,
20 827 (9th Cir. 2003). In King, the Ninth Circuit held that the second
21 Barker factor weighed heavily against a Sixth Amendment violation.
22 There, the district court had "granted continuances at the request of
23 [the defendant] and his attorney," delaying the defendant's trial for
24 nearly two years. King, 483 F.3d at 976. The case was also
25 extraordinarily complex, involving banking and identity-theft
26 conspiracy. Id. Furthermore, the defendant "substituted a new
27 attorney halfway through the proceedings, which necessarily required
28 the judge to allow extra time for new counsel to prepare." Id.

1 Under these circumstances, the Ninth Circuit held that there was no
2 violation of the Sixth Amendment. Id. at 977.

3 The instant case mirrors King. Here, defendant requested eight
4 continuances, including one over the government's objection,
5 "delaying his trial for well over three years." Olsen, 21 F.4th at
6 1046. Defendant's deliberate and repeated decisions to continue the
7 trial date cuts against a finding of a Speedy Trial violation. See
8 United States v. Shetty, 130 F.3d 1324, 1331 (9th Cir. 1997)
9 (reversal of conviction on speedy trial grounds not warranted where
10 defendant stipulated to continuances). This case, like King, is
11 complex, requiring expert opinion. And like the defendant in King,
12 defendant here substituted new counsel nearly 18 months after
13 defendant's initial appearance, which prevented the trial from
14 proceeding on June 10, 2019. (Dkt Nos. 27, 36.) Further, the Ninth
15 Circuit and this Court have held that the government is not at fault
16 for the delay since it was the Central District at large that decided
17 not to conduct jury trials. Olsen, 21 F.4th at 1046 (finding that at
18 the time defendant invoked his Speedy Trial rights "the prosecution
19 had been ready for trial for months and was wholly blameless for the
20 Central District's suspension of jury trials."); (see also, Dkt 52,
21 Tr. at 16, 20.) Thus, the second Barker factor substantially tilts
22 in favor of finding no Sixth Amendment violation.

23 4. Defendant's Assertion of His Right

24 The third Barker factor also weighs against defendant's Speedy
25 Trial violation claim. "[A] defendant's assertion of or failure to
26 assert his right to a speedy trial is one of the factors to be
27 considered in an inquiry into the deprivation of the [Sixth
28 Amendment] right." Barker, 407 U.S. at 528. "[A]n improper or

1 untimely assertion of speedy trial rights may weigh in favor of
2 rejecting a defendant's motion to dismiss for violation of these
3 rights, [but] the mere fact of proper, timely assertion does not
4 warrant dismissal." United States v. Turner, 926 F.2d 883, 889 (9th
5 Cir. 1991). "These assertions, however, must be viewed in the light
6 of respondents' other conduct." United States v. Loud Hawk, 474 U.S.
7 302, 314 (1986). Where the defendant made "successive requests for
8 continuances" and was "responsible for much of the delay," this
9 factor is weighed against the defendant. United States v. Lam, 251
10 F.3d 852, 859 (9th Cir. 2001).

11 Defendant delayed in invoking his speedy trial rights. On
12 August 20, 2020, three years and eight continuances after the filing
13 of the Indictment on July 6, 2017, defendant "for the first time,
14 invoked his right to a speedy trial and expressed a desire to proceed
15 with a jury trial on October 13, 2020." Olsen, 21 F.4th at 1042.

16 Defendant was responsible for this delay. Defendant requested
17 the eight continuances. (Dkt. Nos. 18, 20, 22, 25, 34, 42, 43, 45.)
18 When the government sought to try him in November 2019, he objected
19 and filed an ex parte application to continue the trial. Defendant
20 also waited 18 months to substitute his prior counsel and waited over
21 three years before filing a motion to suppress. Based on Defendant's
22 delay in invoking his Speedy Trial rights and numerous requests for
23 continuances, the third Barker factor counsels against finding a
24 Sixth Amendment violation.

25 5. Prejudice to Defendant

26 Because defendant cannot prove prejudice, the fourth Barker
27 factor militates against a dismissal on Sixth Amendment grounds.
28 "[W]hether actual prejudice must be shown for delays caused by the

1 government's negligence depends on the length of the delay and the
 2 facts of the case." United States v. Martinez-Alcala, 578 F. App'x
 3 650, 651 (9th Cir. 2014). "Where the delay is not 'great,' . . .
 4 courts may require a showing of prejudice, even where each factor
 5 weighs in favor of the defendant." Martinez-Alcala, 578 F. App'x at
 6 651; see also Gregory, 322 F.3d at 1165 (holding that a 22-month
 7 delay did not excuse the defendant from demonstrating actual
 8 prejudice). Thus, the Court must "weigh the reasons for and the
 9 extent of the delay against the evidence of actual prejudice."
 10 United States v. Beamon, 992 F.2d 1009, 1013 (9th Cir. 1993).

11 As explained above, the delay from indictment to October 27,
 12 2020, (about 40 months) is not great. More importantly, all of the
 13 delay is attributable to defendant. Defendant requested eight
 14 continuances up to October 13, 2020. Any delay thereafter is also
 15 not attributable to the government as the government was "wholly
 16 blameless for the Central District's suspension of jury trials.
 17 Olsen, 21 F.4th at 1046. Because the delay is attributable to
 18 defendant, defendant must establish actual prejudice. United States
 19 v. Krug, 666 F. App'x 665, 667-68 (9th Cir. 2016) (34-month delay,
 20 with 20 months attributable to government negligence, did not relieve
 21 defendant from showing actual prejudice).

22 Defendant cannot show actual prejudice. Defendant, who did not
 23 spend a single night in custody,³ was on bond during the entirety of
 24 _____

25 ³ According to Judge Bumatay's concurrence in the denial of
 26 rehearing en banc, the fact that defendant was on pre-trial release
 27 is by itself nearly fatal to defendant's Speedy Trial right claim.
 28 "[T]he primary guarantee of the right is to protect against prolonged
 pretrial detention by the government. Olsen was on bail pretrial,
 and while the indefinite suspension of jury trials is disconcerting,
 the trial delay doesn't appear to offend the core right as
 (footnote cont'd on next page)

1 the delay and suffered, at most, "minimal prejudice." Olsen, 21
2 F.4th at 1046. All that defendant can claim is that he has suffered
3 the type of prejudice present in every criminal case, including
4 disruption of employment, and anxiety, among other factors. (Mot. at
5 108.) These consequences flow from the fact of defendant's arrest,
6 not from any trial delay. United States v. Simmons, 536 F.2d 827,
7 831-32 (9th Cir. 1976) ("Conclusory allegations of general anxiety
8 and depression are present in almost every criminal prosecution. We
9 find nothing in the record which distinguishes the emotional strain
10 experienced by Simmons from other criminal defendants."). Because
11 defendant cannot show that he was prejudiced from the over three-year
12 delay that he himself requested, his Sixth Amendment Speedy Trial
13 right claim must fail.

14 6. The Central District's Jury Trial Suspension Did Not
15 Violate the Sixth Amendment

16 Unable to establish a Sixth Amendment violation under the Barker
17 factors, defendant further argues that the Central District's jury
18 trial suspension itself violated the Sixth Amendment. (Mot. at 109.)

19 Olsen squarely rejected this argument. "The Central District of
20 California did not cast aside the Sixth Amendment when it entered its
21 emergency orders suspending jury trials based on unprecedented public
22 health and safety concerns. To the contrary, the orders make clear
23 that the decision to pause jury trials and exclude time under the
24 Speedy Trial Act was not made lightly." 21 F.4th at 1049.

25 Defendant's reliance on United States v. Allen, 34 F.4th 789
26 (9th Cir. 2022), to argue a violation of the Sixth Amendment right to

27
28 established by the Sixth Amendment." 21 F.4th at 1058 (Bumatay, J.)
(concurring in denial of reh'g en banc) (emphasis in original).

1 a Speedy Trial is misplaced. In Allen, the Ninth Circuit held that
2 the district court violated the Sixth Amendment right to a public
3 trial by precluding members of the public from entering the courtroom
4 pursuant to COVID-19 health and safety protocols. Id. at 800. In
5 reaching this holding, the Ninth Circuit applied the relevant factors
6 in assessing a district court's total closure of a courtroom,
7 including: (1) whether there was "an overriding interest based on
8 findings that closure is essential to preserve higher values"; (2)
9 whether the closure was "narrowly tailored to serve" the overriding
10 interest; and (3) whether the district court considered "reasonable
11 alternatives to closing the courtroom." Id. at 797.

12 These factors have no bearing on the issue before this Court,
13 which is whether the delay in bringing defendant to trial violated
14 the Sixth Amendment right to a speedy trial. As discussed in detail
15 above, that Barker factors govern that inquiry and, as applied to
16 defendant's case, they heavily weigh against finding a Speedy Trial
17 right violation.

18 Similarly, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.
19 Ct. 63 (2020), does not aid defendant in establishing a violation of
20 his Speedy Trial right. At issue in that case were New York's COVID-
21 19 related restrictions on attendance at religious services. Id. at
22 65-66. As non-neutral and non-generally applicable restrictions, to
23 pass constitutional muster, the restrictions were required to be
24 "narrowly tailored," and to "serve a 'compelling' state interest."
25 Id. at 67. The Supreme Court held that the restrictions were not
26 narrowly tailored as there were "many other less restrictive rules"
27 that the state could have enacted to minimize the risk associated
28 with the attendance of religious services during the pandemic. Id.

1 Roman Catholic's analysis of the plaintiffs' First Amendment
2 rights, involving strict scrutiny review, has no bearing on the Sixth
3 Amendment right to a Speedy Trial, which is governed by the Barker
4 factors. Moreover, Olsen cited Roman Catholic's admonition that
5 "[e]ven in a pandemic, the Constitution cannot be put away and
6 forgotten," id. at 63, and explained that "[t]he Central District of
7 California did not cast aside the Sixth Amendment" when it issued its
8 jury trial suspensions. Olsen, 21 F.4th at 1049.

9 While "reasonable minds may differ" on whether the Central
10 District adopted the proper approach in suspending jury trials,
11 Olsen, 21 F.4th at 1049, the jury trial suspension did not violate
12 defendant's Speedy Trial right.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the government respectfully requests
15 that this Court reinstate the Indictment, grant an appropriate ends-
16 of-justice continuance, and set this case for a trial.